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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

Conservatorship of the Estate of IDA McQUEEN.	
FESSHA TAYE, as Conservator, etc., Plaintiff and Respondent, v. CAROL VERES REED, Defendant and Appellant.	A134337 (Alameda County Super. Ct. No. HP05237122)

I.

INTRODUCTION

After a jury trial, Fessha Taye, who is the conservator for 77-year-old Ida McQueen (collectively, respondent), prevailed in his action for financial elder abuse against attorney Carol Veres Reed (appellant). Respondent also prevailed in defending the judgment on appeal.[1] Appellant then paid the $402,000 judgment, including interest, in full. Thereafter, respondent moved for the recovery of an additional $57,681.90 in attorney fees and costs incurred for defending the judgment on appeal and in bringing a separate lawsuit to prevent appellant from transferring three parcels of real property to

[1] Following our affirmance of the judgment, appellant filed a petition for review in the California Supreme Court, which denied the petition, but ordered the opinion be depublished. (*Conservatorship of McQueen* (Mar. 14, 2011, A126825) review denied and opn. ordered nonpub. June 8, 2011, S192507.)

third parties in a purported attempt to avoid satisfaction of the judgment. The trial court granted respondent's motion over appellant's objection that the motion was untimely.

We agree with appellant that respondent's motion was untimely, and reverse.

II.

FACTS AND PROCEDURAL HISTORY

The sole issue raised by this appeal is whether respondent's motion for attorney fees and costs was timely filed after appellant fully satisfied the judgment against her. Therefore an extended discussion of the facts in the underlying case is unwarranted. Briefly, in 2006, respondent filed a complaint against appellant and several other defendants claiming causes of action for financial elder abuse, fraud and concealment, conversion, breach of fiduciary duty and negligence. Essentially, respondent claimed that the defendants violated the terms of a trust set up for Ida McQueen, a mentally and physically disabled elder, when they sold the family residence, in which McQueen held a life estate, without her consent or knowledge. Appellant was the family attorney who prepared the trust, and who played an active role in the sale of the property and distribution of the proceeds.

The matter was tried to a jury, and appellant was found liable for financial elder abuse, breach of fiduciary duty as an attorney, and conversion. On September 11, 2009, judgment was entered against appellant and two other defendants for compensatory damages in the amount of $99,900. Appellant was the only defendant who was found liable under the elder abuse statute, which contains an attorney fees and costs provision. (Welf. & Inst. Code, § 15657.5, subd. (a).) As a result, she was the only defendant ordered to pay attorney fees and costs to respondent in the amount of $302,000.

After judgment was entered against appellant, she and the other two defendants filed an appeal in this court. We affirmed the judgment (*Conservatorship of McQueen*, *supra*, A126825).

In the meantime, in December 2009, respondent filed a new complaint against appellant, her husband, and her two children alleging that fraudulent transfers of real property had been made shortly after the jury rendered its verdict in the underlying case

in an effort to avoid satisfaction of the judgment against appellant. This new lawsuit was ultimately dismissed after settlement was reached, and appellant and her family members agreed to transfer the property back to appellant.

Through a series of payments beginning in May 2011, and ending with a check that was accepted and deposited by respondent on July 15, 2011, appellant eventually paid an amount that fully satisfied the judgment, with interest. On July 25, 2011, 10 days after respondent deposited the final check that satisfied the judgment, respondent filed a "Second Motion for Reasonable Attorney Fees and Costs" requesting additional attorney fees and costs in the amount of $57,681.90. The requested fees were not only for the cost of defending the appeal, but also included all costs and attorney fees associated with the complaint that alleged appellant had made fraudulent conveyances to avoid paying the judgment.

In responsive papers, and then in a more developed argument in front of the judge when the motion was argued, appellant contended that respondent was barred from filing a motion for additional fees by virtue of the fact that the judgment in the case had already been fully paid, citing Code of Civil Procedure sections 685.070 and 685.080, and a federal case interpreting these statutes, *Carnes v. Zamani* (9th Cir. 2007) 488 F.3d 1057 (*Carnes*).[2] After receiving supplemental briefing on the timeliness of respondent's motion, the trial court ruled in respondent's favor, concluding that appellant's argument that satisfaction of the judgment cut off respondent's right to additional attorney fees was "unsupported." The court then awarded respondent $56,974.50 in "reasonable attorneys' fees incurred on appeal and in connection with related collection efforts . . . ."[3] This appeal followed.

[2] All undesignated statutory references are to the Code of Civil Procedure.

[3] Because we conclude the motion should have been denied as untimely, we need not reach appellant's backup argument that the amount awarded was unreasonable.

III.

DISCUSSION

"On review of an award of attorney fees after trial, the normal standard of review is abuse of discretion. However, de novo review of such a trial court order is warranted where the determination of whether the criteria for an award of attorney fees and costs in this context have been satisfied amounts to statutory construction and a question of law. [Citations.]" (*Carver v. Chevron U.S.A., Inc.* (2002) 97 Cal.App.4th 132, 142.) The question on appeal is whether appellant's full satisfaction of the judgment barred respondent from seeking additional fees and costs. The question is resolved through statutory construction, specifically sections 685.040, 685.070 and 685.080. Consequently, the correct standard for review is de novo.

When the court granted respondent's "Second Motion for Reasonable Attorney Fees and Costs," it relied on section 685.040, which expressly allows a party to collect its reasonable costs, including attorney fees, in an action for the enforcement of a judgment where the underlying judgment included an award of attorney fees. (See *Globalist Internet Technologies, Inc. v. Reda* (2008) 167 Cal.App.4th 1267, 1274-1276 [attorney fees incurred in enforcing judgment, or defending its validity against a challenge in another forum, recoverable under § 685.040]; *Jaffe v. Pacelli* (2008) 165 Cal.App.4th 927, 938 [attorney fees and expenses expended by the respondent in seeking to defeat the appellant's appeal fall within the ambit of what is compensable under § 685.040].) The attorney fees may be claimed either filing a memorandum of costs (§ 685.070, subd. (b)) or by a noticed motion (§ 685.080, subd. (a)).

Respondent chose to seek additional fees by motion, and section 685.080 is explicit as to the time requirements for bringing such a motion. Section 685.080, subdivision (a), provides in part: "The judgment creditor may claim costs authorized by Section 685.040 by noticed motion. *The motion shall be made before the judgment is satisfied in full,* but not later than two years after the costs have been incurred." (Italics

added.)[4] As explained in *Lucky United Properties Investment, Inc. v. Lee* (2010) 185 Cal.App.4th 125, "the statutory purpose of requiring that the motion for enforcement costs be brought 'before the judgment is satisfied in full' [citation] is to avoid a situation where a judgment debtor has paid off the entirety of what he believes to be his obligation in the entire case, only to be confronted later with a motion for yet more fees. [Citation.]" (*Id*. at p. 144.)

Thus, the statutory scheme governing the recovery of postjudgment attorney fees unambiguously required respondent to request attorney fees before the underlying judgment had been fully satisfied. Here, respondent deposited appellant's last payment in full satisfaction of the judgment on or about July 15, 2011, leading appellant to believe she had fully satisfied her entire obligation. (See § 724.010, subd. (a) ["A money judgment may be satisfied by payment of the full amount required to satisfy the judgment"].) Ten days later, respondent filed a "Second Motion for Reasonable Attorney Fees and Costs" requesting additional attorney fees and costs in the amount of $57,681.90. Given that respondent's July 25, 2011 motion was filed after appellant fully satisfied the judgment, respondent was precluded from recovering more postjudgment costs and attorney fees.

In so holding, we find persuasive the conclusion reached in *Carnes, supra*, 488 F.3d at page 1061: "Because their right to recover post-judgment attorney fees is dependent on section 685.040, [the claimants] were required to comply with the timeliness requirements for post-judgment attorney fee motions set forth in the [enforcement of judgment law]. Sections 685.070 and 685.080 require that a motion for fees incurred in enforcing a judgment be filed before the underlying judgment is fully

[4] Section 685.070, subdivision (b), similarly requires that the memorandum of costs be filed "[b]efore the judgment is fully satisfied."

satisfied. Because the [claimants] filed their postjudgment fee motion after the underlying judgment was fully satisfied, the motion was untimely."[5]

While respondent spends a great deal of time on irrelevant matters, such as reiterating the details of appellant's wrongdoing and criticizing the State Bar of California's investigation into appellant's conduct in the underlying case, respondent fails to address the main issues governing the disposition of this appeal. For instance, respondent does not dispute that the attorney fees and expenses expended in seeking to defeat appellant's appeal and in bringing a separate lawsuit to make sure that assets would be available to satisfy the judgment fall within the ambit of what is compensable under section 685.040, i.e., "[a]ttorney fees incurred in enforcing a judgment." Nor does respondent attempt to distinguish or refute the reasoning of *Carnes*, *supra*, 488 F.3d at page 1060, holding that the rights contained in section 685.040 can be implemented either by motion (§ 685.080) or by memorandum of costs (§ 685.070), but "[u]nder either section, the judgment creditor must request post-judgment attorney fees *before the underlying judgment is fully satisfied*." (*Carnes*, at p. 1060, italics added.) Furthermore, respondent does not challenge appellant's chronology of events establishing that the judgment was satisfied in full 10 days before respondent filed his motion for additional attorney fees and costs. (See *County of Butte v. Bach* (1985) 172 Cal App.3d 848, 867 [issues raised by appellant which are unaddressed in respondent's brief are deemed submitted on appellant's brief].)

Instead, respondent's sole argument that might be deemed relevant to the dispute at hand is that his motion was timely because he complied with the procedure and time limits set forth in California Rules of Court, rule 3.1702(c), for a motion to claim attorney

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[5] Although we are not bound by Ninth Circuit authority, we find the court's analysis in *Carnes* to be persuasive, well-reasoned, and precisely on point. (See *Adams v. Pacific Bell Directory* (2003) 111 Cal.App.4th 93, 97 ["although not binding, we give great weight to federal appellate court decisions"]; *Travelers Casualty & Surety Co. v. Superior Court* (1998) 63 Cal.App.4th 1440, 1454 [following "the well-reasoned and on-point decisions of the Ninth Circuit"].)

fees on appeal.[6] That rule provides that in order to recover appellate attorney fees and expenses, respondent was required to serve and file a notice of motion for attorney fees on appeal and a memorandum of costs within 40 days after the clerk of this court sent notice of the issuance of the remittitur.[7] Since respondent filed his "Second Motion for Reasonable Attorney Fees and Costs" on the 40th day after the remittitur issued in this case, he claims the motion was timely filed.

However, the 40-day time limitation established in rule 3.1702 applies "[e]xcept as otherwise provided by statute . . . ." (Rule 3.1702(a).) Therefore, facially rule 3.1702 was not intended to prevail over the statutory language of sections 685.070 and 685.080, both of which plainly preclude a postjudgment request for additional fees and costs after the judgment has been fully satisfied. For this reason we hold that sections 685.070 and 685.080 must be given effect over the 40-day timeframe established by rule 3.1702(c).

For the first time at oral argument, respondent's counsel argued that section 685.040 was inapplicable to this case—even though the trial court specifically stated it was awarding respondent attorney fees pursuant to section 685.040. Counsel claimed that section 685.040, and its companion statutes 685.080 and 685.070, only authorize the recovery of attorney fees where the underlying judgment includes an award of attorney fees *arising from contract*. Since the attorney fees in the underlying case *arose from statute* (elder abuse statute), counsel claimed that section 685.040, and the timeliness requirements imposed by section 685.080, were inapplicable to this case.

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[6] All rule references are to the California Rules of Court.

[7] Rule 3.1702(c) provides that "A notice of motion to claim attorney's fees on appeal . . . under a statute or contract requiring the court to determine entitlement to the fees, the amount of the fees, or both, must be served and filed within the time for serving and filing the memorandum of costs under rule 8.278(c)(1) . . . ." Rule 8.278(c)(1) provides, "Within 40 days after the clerk sends notice of issuance of the remittitur, a party claiming costs awarded by a reviewing court must serve and file in the superior court a verified memorandum of costs under rule 3.1700." The time for filing a motion for attorney fees on appeal may be extended by stipulation of the parties (rule 3.1702(c)(2)) or by the trial court upon a showing of good cause (rule 3.1702(d)).

We need not address this argument, as it was made for the first time at oral argument. (See, e.g., *Sunset Drive Corp. v. City of Redlands* (1999) 73 Cal.App.4th 215, 226 [declining to consider waiver and statute of limitations issues raised by respondent for the first time at oral argument].) However, even if we were to consider the argument, we would reject it as unsupported by the language of section 685.040 and controlling authority from the California Supreme Court.

Section 685.040 provides as follows: "The judgment creditor is entitled to the reasonable and necessary costs of enforcing a judgment. Attorney's fees incurred in enforcing a judgment are not included in costs collectible under this title unless otherwise provided by law. Attorney's fees incurred in enforcing a judgment are included as costs collectible under this title if the underlying judgment includes an award of attorney's fees to the judgment creditor pursuant to subparagraph (A) of paragraph (10) of subdivision (a) of Section 1033.5."

Focusing exclusively on the last sentence of section 685.040, respondent's counsel claims that because section 1033.5, subdivision (a)(10)(A) permits fees authorized by "[c]ontract" to be included as an item of costs, section 685.040 allows the judgment creditor to recover attorney fees *only* if the attorney fee award in the underlying judgment was based on *contract*, not a statute.

Counsel's reading of this last sentence of the statute is correct as far as it goes. It is obvious that the last sentence of section 685.040—which authorizes an award of attorney fees incurred in enforcing the judgment, where the judgment includes an award of attorney fees arising from *contract*—does not itself authorize the recovery of fees here, where the fees in the underlying judgment were authorized by *statute*.

However, the *second* sentence of section 685.040 states that attorney fees incurred in enforcing a judgment are not recoverable "unless otherwise provided by law." It seems evident that if attorney fees are authorized by statute, they have been "otherwise provided by law," and thus may be recovered as costs if expended to enforce a judgment.

Significantly, the California Supreme Court in *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1141, footnote 6 (*Ketchum*), construed an attorney fees *statute* so as to

authorize attorney fees under the "otherwise provided by law" language of section 685.040. In that case, our state Supreme Court held that section 425.16—which permits a defendant to "recover his . . . attorney's fees and costs" for bringing a successful motion to strike a strategic lawsuit against public participation (SLAPP) suit—includes "the fees incurred in enforcing the right to mandatory fees under Code of Civil Procedure section 425.16." (*Ketchum*, at p. 1141.) Rejecting the plaintiff's argument that "section 685.040 preclude[d] [such] an award of 'collection' fees," the state high court reasoned: "The statute [§ 685.040] provides that attorney fees incurred in enforcement efforts 'are not included in costs collectible under this title unless otherwise provided by law.' Under its provisions, a litigant entitled to costs for successfully enforcing a judgment is entitled to costs, but not attorney fees *unless there is some other legal basis for such an award.* Because Code of Civil Procedure section 425.16, subdivision (c) provides a legal right to attorney fees, they are a permissible item of costs. [Citation.]" (*Ketchum*, at p. 1141, fn. 6.)

Likewise, here, there was "some other legal basis" for the award of attorney fees, namely, the elder abuse statute, upon which basis respondent was awarded attorney fees as part of the judgment. (*Ketchum*, *supra*, 24 Cal.4th at p. 1141, fn. 6.) As such, the elder abuse statute made the attorney fees incurred in enforcing the judgment a permissible item of costs under section 685.040.

At oral argument, respondent's counsel cited *Berti v. Santa Barbara Beach Properties* (2006) 145 Cal.App.4th 70 (*Berti*), a case not mentioned in his brief, in support of counsel's argument that section 685.040 is inapplicable to a case where the underlying attorney fee award was based on statute. However, a close reading of *Berti* finds that it supports, rather than defeats an award of attorney fees under section 685.040 in a case such as this. (See *Berti*, at pp. 76-77 [§ 685.040 did not preclude award of postjudgment attorney fees authorized under Corporations Code section 15634 in an action to enforce limited partners' right to inspect partnership books; recovery of those fees was "otherwise provided by law"].)

IV.

DISPOSITION

The order granting respondent's motion for attorney fees is reversed. Appellant is awarded her costs on appeal.

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RUVOLO, P. J.

We concur:

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REARDON, J.

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HUMES, J.